Filed 6/11/19 In re Lucas H. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re LUCAS H., a Person Coming Under the Juvenile Court Law.	B290051 (Los Angeles County Super. Ct. No. 17CCJP00920)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GEORGEANNE G., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Michael A Whitaker, Judge. Affirmed.

Donna B. Kaiser, under appointment by the Court of Appeal, for Appellant Georgeanne G.

Mary C. Wickham, County Counsel, R. Kristin P. Miles, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

Georgeanne G. (Mother), the mother of minor Lucas H., appeals from the juvenile court's findings and orders at a hearing held under Welfare and Institutions Code section 387. Mother contends that the juvenile court and the Department of Children and Family Services (DCFS) failed to comply with their notice obligations under the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) and related California law. We agree there was a lack of compliance with ICWA's notice provisions, but conclude the error was harmless. We therefore affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Initiation of Dependency Proceedings

Mother and Sean H. (Father) are the parents of Lucas H., a boy born in September 2015. On October 6, 2017, the DCFS filed a dependency petition on behalf of Lucas pursuant to Welfare and Institutions Code[1] section 300, subdivisions (a) and (b). The petition alleged that the child was at a substantial risk of harm because Mother and Father had a history of domestic violence, Mother was a current abuser of marijuana, and Father was a current abuser of methamphetamine. At the time the petition was filed, Lucas was residing with Mother and Father's whereabouts were unknown.

A detention hearing was held on October 10, 2017. Mother appeared at the hearing and was appointed counsel. Father did not make an appearance. The juvenile court found there was prima facie evidence that Lucas was a person described by section 300, and ordered that the child be detained from Father

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[1] Unless otherwise stated, all further statutory references are to the Welfare and Institutions Code.

and released to Mother. At the hearing, Mother signed a Judicial Council Parental Notification of Indian Status form in which she indicated that she had no known Indian ancestry. The court made a finding at the hearing that it had no reason to know that ICWA applied as to Mother, but it deferred a ruling on the applicability of ICWA as to Father pending his appearance. The matter was set for an adjudication hearing on December 15, 2017.

II. Arraignment Hearing for Father

In its Jurisdiction/Disposition Report filed on December 6, 2017, the DCFS stated that Lucas was residing in a motel with Mother, and that Father was reported to be transient. In a December 4, 2017 interview with the DCFS, Mother again denied having any American Indian ancestry. While the DCFS had been unable to interview Father, the paternal grandfather told the agency on December 4, 2017 that Father did not have any affiliation or eligibility with an American Indian tribe. In its report, the DCFS stated that, "as part of [its] investigation, the Department has determined that ICWA does not apply, and . . . would therefore request that the court make appropriate ICWA findings in this case."

On December 7, 2017, the juvenile court held an arraignment hearing for Father. Father appeared at the hearing and was appointed counsel. The court found that Father was the presumed father of Lucas, and ordered that the child remain detained from Father and released to Mother pending the adjudication hearing. At the arraignment hearing, Father signed a Judicial Council Parental Notification of Indian Status form in which he indicated that he may have Indian ancestry based on an "unknown tribe from [his] mother's side." In its December 7,

2017 minute order for the arraignment hearing, the juvenile court stated that it was "informed that there may Cherokee Native American/Indian heritage in the father's background," and that the DCFS "is ordered to investigate said claim."

III. Jurisdiction and Disposition Hearing

In a Last Minute Information for the Court filed on December 13, 2017, the DCFS reported that it had further investigated Father's possible Indian ancestry. On December 8, 2017, the agency spoke with Father, who stated that he was not registered with a tribe, had never received services from a tribe, and did not believe he was eligible for tribal services. Father told the DCFS that he had informed the court of a possible Indian ancestry at the arraignment hearing "based on something the [paternal grandmother] had once commented about." That same day, the DCFS also spoke with the paternal grandfather, who indicated that neither he nor the paternal grandmother had any American Indian ancestry or were eligible for any tribal services. On December 10, 2017, the DCFS spoke with the paternal grandmother. She advised the agency that she did not have any American Indian ancestry, was never registered with a tribe, and was not eligible for tribal services.

On December 15, 2017, the juvenile court held the jurisdiction and disposition hearing. Following the entry of no contest pleas by both parents, the court sustained the section 300 petition, as amended, and declared Lucas a dependent of the court pursuant to section 300, subdivision (b). The court ordered that the child be removed from the custody of Father and placed in the home of Mother under the supervision of the DCFS. The parents were ordered to comply with their respective case plans, which included random, on-demand drug testing. Mother also

was ordered not to allow her current boyfriend, Arthur A., to have any contact with Lucas based on the DCFS's report that Arthur recently had been convicted of rape. In its December 15, 2017 minute order for the jurisdiction and disposition hearing, the court noted that "ICWA notices remain pending," but made no finding as to the applicability of ICWA at that time.[2]

IV. Section 387 Supplemental Petition

On January 16, 2018, the DCFS filed a supplemental dependency petition on behalf of Lucas pursuant to section 387. The petition alleged that Mother continued to abuse illicit drugs, including marijuana, and had failed to comply with the juvenile court's order by allowing her boyfriend, Arthur, to reside in her home and have unlimited access to Lucas. At a detention hearing held on January 17, 2018, the juvenile court ordered that Lucas be detained from Mother and suitably placed by the DCFS. The matter was set for an adjudication hearing on the section 387 petition.

In a Jurisdiction/Disposition Report dated March 20, 2018, the DCFS informed the court that Lucas had been placed with the paternal grandparents, and appeared to be doing well in their care. With respect to the child's ICWA status, the DCFS noted that the court previously had ordered the agency to investigate possible Cherokee ancestry on Father's side of the family. In addition to summarizing the information that had been provided

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[2] The record on appeal does not include copies of any ICWA notices that were sent to any tribes or to the Bureau of Indian Affairs (BIA); nor does it include a reporter's transcript from the December 15, 2017 hearing at which the status of any pending ICWA notices may have been addressed.

by Father and the paternal grandparents in December 2017, the DCFS indicated that it was attaching two letters to its report. The first letter dated January 22, 2018 was from the United Keetoowah Band of Cherokee Indians in Oklahoma, and provided that Lucas did not meet the necessary requirements to become eligible for enrollment or recognized as a member of that tribe. The second letter dated January 16, 2018 was from the Eastern Band of Cherokee Indians, and related that Lucas was neither registered nor eligible to register as a member of that tribe. In its March 20, 2018 report, the DCFS continued to state that "as part of [its] investigation, the Department has determined that ICWA does not apply, and . . . would therefore request that the court make appropriate ICWA findings in this case."

On May 9, 2018, the juvenile court held the adjudication hearing on the section 387 petition. The parents' respective counsel appeared at the hearing, but neither Mother nor Father was present. The court began by addressing the applicability of ICWA to the case, stating: "With respect to ICWA, based on the information set forth in the jurisdiction/disposition report dated March 20, 2018, the court is finding that there's no reason to believe the minor child is an Indian child within the meaning of ICWA and finds ICWA does not apply." In response to the court's inquiry whether anyone wished to be heard, counsel for all parties declined.[3] The court then sustained the section 387

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[3] In its May 9, 2018 minute order for the adjudication hearing on the section 387 petition, the court stated that it "does not have reason to know that this is an Indian child, as defined under ICWA, and does not order notice to any tribe or the BIA." The minute order did not address the status of the ICWA notices that had been pending as of December 15, 2017.

petition and declared that Lucas continued to be a dependent of the court pursuant to section 300, subdivision (b). The court ordered that Lucas be removed from Mother's custody and suitably placed under the supervision of the DCFS.

V. Mother's Current Appeal

On May 9, 2018, Mother filed a notice of appeal from the juvenile court's findings and orders at the hearing on the section 387 petition. Mother's appellate counsel thereafter requested that the record on appeal be corrected to include any ICWA notice forms and any evidence of mailing or receipt of documents by any tribes. In response to this request, the clerk of the superior court supplemented the clerk's transcript with copies of the Parental Notification of Indian Status forms signed by Mother and Father, but provided no other records pertaining to ICWA.

DISCUSSION

On appeal, Mother solely challenges the juvenile court's finding at the May 9, 2018 hearing on the section 387 petition that ICWA did not apply to the dependency proceedings. Mother contends that such finding must be conditionally reversed and the matter remanded to the juvenile court because both the court and the DCFS failed to comply with ICWA's notice requirements.

A. Overview of Governing Law

ICWA provides that "[i]n any involuntary proceeding in a [s]tate court, where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe" of the pending proceedings and the right to intervene.

(25 U.S.C. § 1912(a).) Similarly, California law requires notice to the child's parent or Indian custodian and the child's tribe in accordance with section 224.3 if there is reason to know that an Indian child is involved in the proceedings. (§ 224.2, subd. (f).) Both juvenile courts and child protective agencies "have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . may be or has been filed, is or may be an Indian child." (§ 224.2, subd. (a); see also Cal. Rules of Court, rule 5.481(a); *In re Isaiah W.* (2016) 1 Cal.5th 1, 15 ["juvenile court has an affirmative and continuing duty in all dependency proceedings to inquire into a child's Indian status"].)

California law provides that if the juvenile court or the child protective agency "has reason to believe that an Indian child is involved in a proceeding, the court [or] social worker . . . shall make further inquiry regarding the possible Indian status of the child . . . as soon as practicable." (§ 224.2, subd. (e).) "Further inquiry includes, but is not limited to . . . [i]nterviewing the parents, Indian custodian, and extended family members," and "[c]ontacting the tribe or tribes and any other person that reasonably can be expected to have information regarding the child's membership, citizenship status, or eligibility." (§ 224.2, subd. (e)(1),(3); see also Cal. Rules of Court, rule 5.481(a)(4)(A).) Circumstances that may provide reason to know that the child is an Indian child include when a person having an interest in the child, such as a member of the child's extended family, provides information suggesting that the child is an Indian child to the court or child protective agency. (§ 224.2, subd. (d)(1); Cal. Rules of Court, rule 5.481(a)(5)(A).)[4] "[A]n adequate investigation of a

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[4] The federal regulations implementing ICWA state that a court has "reason to know" that the child is an Indian child if

family member's belief a child may have Indian ancestry is essential to ensuring a tribe entitled to ICWA notice will receive it." (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 787.)

Both federal and state law set forth specific requirements for providing ICWA notice once there is reason to know that an Indian child is involved in the proceedings. Under the applicable federal regulations, the juvenile court must ensure that the party seeking a foster care placement or termination of parental rights promptly send notice to the child's tribe, the child's parents, and if applicable, the child's Indian custodian. (25 C.F.R. § 23.111(a)-(c).) California law likewise requires that ICWA notice be sent to the child's parents or legal guardian, the Indian custodian, if any, and the child's tribe. (§ 224.3, subd. (a); see also Cal. Rules of Court, rule 5.481(b)(1) ["[i]f it is known or there is reason to know that an Indian child is involved . . ., the social worker . . . must send Notice of Child Custody Proceeding for Indian Child (form ICWA-030) to the parent or legal guardian and Indian custodian of an Indian child, and the Indian child's tribe"].) The notice must be sent by registered or certified mail with return receipt requested. (25 C.F.R. § 23.111(c); § 224.3, subd. (a)(1).) The federal regulations provide that "the court must ensure that . . . [a]n original or a copy of each notice sent . . . is filed with the court together with any return receipts or other proof of service." (25 C.F.R. 23.111(a)(2).) Section 224.3 states that, except in the case of a detention hearing held pursuant to section 319, "[p]roof of the notice, including copies of notices sent and all return

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"[a]ny participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child." (25 C.F.R. § 23.107(c)(2).)

receipts and responses received, shall be filed with the court in advance of the hearing. . . ." (§ 224.3, subd. (c); see also Cal. Rules of Court, rule 5.482(b) ["[p]roof of notice filed with the court must include Notice of Child Custody Proceeding for Indian Child (form ICWA-030), return receipts, and any responses received"].)

Under California law, "[w]hen there is reason to know that the child is an Indian child, the court shall treat the child as an Indian child unless and until the court determines on the record and after review of the report of due diligence [provided by the child welfare agency], and a review of the copies of notice, return receipts, and tribal responses required pursuant to Section 224.3, that the child does not meet the definition of an Indian child. . . ." (§ 224.2, subd. (i)(1).) "If the court makes a finding that proper and adequate further inquiry and due diligence . . . have been conducted and there is no reason to know whether the child is an Indian child, the court may make a finding that [ICWA] does not apply. . . ." (§ 224.2, subd. (i)(2).)

B. The Lack of Compliance with ICWA's Notice Provisions Was Harmless In This Case

Mother argues that both the DCFS and the juvenile court failed to properly discharge their duties under ICWA and related California law because the DCFS did not file copies of its ICWA notices with the court, and the court did not review the content of the notices before finding that ICWA did not apply. The DCFS does not dispute that its ICWA notices were never filed with, or reviewed by, the juvenile court, but rather asserts that it had no duty to provide ICWA notice in the first place because there was no reason to know that Lucas was an Indian child. Based on the record before us, we conclude that there was a lack of compliance with ICWA's notice provisions because the DCFS provided ICWA

notice to at least two tribes, but never filed copies of the notices with the juvenile court, and thus the court, did not review those notices prior to making a determination that ICWA did not apply. We further conclude, however, that the error was harmless under the circumstances of this case.

California courts generally have held that, where a child protective agency sends ICWA notices to one or more tribes but fails to provide the juvenile court with copies of the notices or the return receipts, the juvenile court lacks sufficient information to determine whether there was compliance with ICWA's notice requirements. (See, e.g., *In re Louis S.* (2004) 117 Cal.App.4th 622, 629 (*Louis S.*); *In re Karla C.* (2003) 113 Cal.App.4th 166, 178-179; *In re Asia L.* (2003) 107 Cal.App.4th 498, 507-509; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 850-853; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 702-705; *In re Samuel P.* (2001) 99 Cal.App.4th 1259, 1266.)[5] In *Louis C.*, for instance, the social worker stated in a status review report that she had sent ICWA notices to one tribe and the BIA. (*Louis C.*, *supra*, at p. 627.) Although the social worker filed the negative response received from the tribe with the juvenile court, she did not provide copies of the notices or any return receipts. (*Id.* at p. 629.) The court of appeal held that the juvenile court erred in finding that ICWA

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[5] These decisions pre-date the enactment of the federal regulation and California statutory provision explicitly requiring that copies of the ICWA notices be filed with the juvenile court. (25 C.F.R. 23.111(a)(2); § 224.3, subd. (c).) The appellate courts in these cases nevertheless concluded that copies of the notices, return receipts, and any responses received must be filed with the juvenile court to allow the court to determine in the first instance whether proper ICWA notice was given.

did not apply to the proceedings because the social worker had failed to comply with ICWA's notice provisions. (*Id*. at p. 626.) As the court explained: "[R]esponses to the ICWA notices without the notices are insufficient because it is impossible to determine from the responses alone whether the notices provided the tribe with relevant information and therefore with a meaningful opportunity to evaluate whether the dependent minor is an Indian child within the meaning of the ICWA. [Citation.] Because the social worker did not file the notices, or copies of the notices and any return receipts, with the court, it was error for the court to conclude the ICWA did not apply because it had insufficient information to reach that conclusion." (*Id*. at p. 629.)

In this case, the record reflects that, after Father reported at his December 7, 2017 arraignment hearing that he might have Cherokee ancestry, the juvenile court ordered the DCFS to investigate Father's claim. The DCFS thereafter sent some form of notice to two of the three federally recognized Cherokee tribes,[6] but never filed copies of the notices or any return receipts with the juvenile court, as required under federal and state law. As a result, the record does not disclose when the ICWA notices were sent, by whom they were received, and what information they included. It is also unknown whether the DCFS sent an ICWA

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[6] As currently listed in the Federal Register, the Cherokee tribes that are recognized by, and eligible for funding and services from, the BIA are the Cherokee Nation, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians in Oklahoma. (84 Fed. Reg. 1200 (Feb. 1, 2019).) These three tribes were the same federally recognized Cherokee tribes at the time of the December 7, 2017 hearing. (82 Fed. Reg. 4915 (Jan. 17, 2017).)

notice to the third federally recognized Cherokee tribe or to the BIA. Instead, the record shows that, in its December 15, 2017 minute order for the jurisdiction and disposition hearing, the juvenile court noted that "ICWA notices remain pending," but made no finding as to applicability of ICWA at that time. The record further shows that, in its March 20, 2018 Jurisdiction/Disposition Report for the section 387 petition, the DCFS attached two negative responses that it had received from the United Keetoowah Band of Cherokee Indians in Oklahoma and from the Eastern Band of Cherokee Indians. The DCFS did not, however, provide the juvenile court with any other information about the status of the ICWA notices.

Accordingly, it appears that, when the juvenile court made a finding at the May 9, 2018 hearing on the section 387 petition that ICWA did not apply, it had not reviewed any copies of the ICWA notices that the DCFS had sent. Without reviewing the content of the notices, the juvenile court did not have a sufficient record from which it could assess whether the notice given by the DCFS was adequate and proper. The DCFS's failure to file copies of its ICWA notices with the juvenile court therefore constituted a lack of compliance with ICWA.

In general, "[d]eficiencies in ICWA inquiry and notice may be deemed harmless error when, even if proper notice had been given, the child would not have been found to be an Indian child." (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251; see also *In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.) Here, the record reflects that both the juvenile court and the DCFS complied with their duty of inquiry, and that the information disclosed by Father and his family about his claim of possible Indian ancestry was insufficient to trigger ICWA's notice requirements. Specifically,

after the juvenile court ordered the DCFS to investigate Father's claim, Father told the case social worker that he believed he might have some Cherokee ancestry "based on something the [paternal grandmother] had once commented about." Father also suggested that the DCFS contact the paternal grandmother about his ICWA claim. The paternal grandmother told the case social worker, however, that she did not have any American Indian ancestry, was never registered with a tribe, and was not eligible for tribal services. The paternal grandfather similarly reported that neither he nor the paternal grandmother had any American Indian ancestry or any eligibility for American Indian tribal services.

Given that Father identified the paternal grandmother as the sole source for his belief that he could possibly have some Cherokee ancestry, and that the paternal grandmother unequivocally denied having any Indian ancestry, there was no reason to know that Lucas might be an Indian child, and thus, no duty to provide ICWA notice to the tribes or the BIA. (See, e.g., *In re W.B.* (2012) 55 Cal.4th 30, 55, fn. 14 ["[c]ontact with the BIA and tribes is required only if information produced by the initial inquiry gives the court [or] social worker . . . reason to know the minor is an Indian child"]; *In re J.L.* (2017) 10 Cal.App.5th 913, 923 ["vague statements suggesting that a child '"may" have Native American heritage [are] insufficient to trigger ICWA notice requirements'"]; *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520 ["more than a bare suggestion that a child might be an Indian child" is required to invoke ICWA's notice obligation].) Under these circumstances, the DCFS's failure to file copies of its ICWA notices with the juvenile court was harmless error.

DISPOSITION

The juvenile court's order sustaining the section 387 petition and removing Lucas from Mother's custody is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.